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EU Committees: Social Regulation, Law and Politics

Edited by
CHRISTIAN JOERGES
and
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Bargaining, Arguing and Functional Differentiation of Decision-making: The Role of Committees in European Environmental Process Regulation

*Thomas Gehring**

1. Introduction

Committees play an important role in the European Community.¹ In quantitative terms, the estimated number of committees existing under the auspices of the Community institutions ranges between several hundred to a thousand. The committees are regularly attended by more than 50,000 people: scientists, civil servants and representatives of interest groups.² In qualitative terms, committees provide the foundation for "bureaucratic" integration theories that emphasise the emergence of a European bureaucratic élite³ or envisage the "fusion" of national and European state bureaucracies.⁴ Based on empirical investigations into committee decision-making in the foodstuffs sector, the members of the Bremen research project have not only claimed that governance by committees is located somewhere between intergovernmentalism and supranationalism⁵ but they also believe that some core institutional features of the EC should be read as "supranational versions of deliberationist ideals".⁶ In combination with

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¹ See Bertram (1967); Grote (1990); Schaefer (1996).

² See Falke (1996: 132-138); Buitendijk/van Schendelen (1995: 40-41); Algieri/Rometsch (1994: 137-141).

³ See Bach (1992). ⁴ See Wessels (1992).

⁵ See Bücker *et al* (1996: 39, 45); Joerges/Neyer (1997a).

⁶ See Joerges/Neyer (1997b).

European law, committees are expected to transform "strategic interaction into deliberative problem-solving".⁷ In this way, a form of governance by committees emerges that need not necessarily reflect an awkward political compromise⁸ – in fact, it may approach a normative ideal that is not even attained within the political systems of the Member States.

Committees therefore represent a particular form of institutionalised decision-making for European governance which is only just beginning to be understood. However, it remains largely unclear whether, and why, committees matter for European governance. They will generally be meaningful if they influence the outcomes of decision-making processes.⁹ Thus, the question arises, how can committees affect decisions in ways that non-committee decision-making processes cannot, and in what kind of mechanism is their influence rooted? In particular, do the participating actors behave differently in committees than outside, and if so, why and under which conditions? This last question cannot be tackled without a distinct *concept of interaction* among the participating actors.

A methodological problem is that the committees under the EC auspices are so diverse in their nature that it is difficult to develop a concept of "committee decision-making" which is meaningful.¹⁰ Whilst some committees consist of Member States' representatives (hereafter, the comitology committees), others constitute forums for interest groups or independent experts. Not only is the membership of these committees different, the opinions which these bodies adopt are of varying degrees of legal weight. Despite the multifarious nature of committees, they all share one feature in common: a committee is always embedded in, and therefore functionally dependent on, the overall decision-making process. Decision-making processes involving committees are sequenced in one way or another, so that the significance of a committee depends on its specific contribution to a larger decision-making process.

This article explores the relevance of committees in European governance on the basis of two premises. First, it assumes that committees are part of overall decision-making processes and cannot readily be understood in isolation from them. Second, it accepts that rational actors do not always act strategically according to their established interests but may, under certain circumstances, also engage in discursive deliberation. In Section 2 the article briefly develops the relevance of sequenced decision-making and introduces two diametrically opposed and ideally constructed modes of interaction among rational actors: "bargaining" and "arguing". Subsequently, the paper proceeds to examine the relevance of committee-based decision-making for

⁷ Joerges/Neyer (1997b), also (1997a) and Neyer (1997).

⁸ See the frequent criticism of comitology decision-making referring to the exclusion of the European Parliament. See Grams (1995: 119-131).

⁹ See van Schendelen (1996: 29).

¹⁰ See van der Knaap (1996).

European environmental process regulation. Section 3 explores the considerable influence of an *ad hoc* advisory expert committee on the negotiation of the Drinking Water Directive of 1980.¹¹ Section 4 compares three comitology committees in the area of environmental process regulation to examine their impact on the bargaining situation among the Member States. Section 5 examines the informal functions that the comitology committees may fulfil if they meet on a regular basis to determine whether the institutional structure provides sufficient room for the exchange of arguments *not* immediately related to their own formal decision-making.

2. The Influence of Committees in European Policy-Making

Any evaluation of the role of committees in European policy-making cannot be limited to their internal decision-making arrangement. It must begin with the overall decision-making process of which committee interaction forms an important part. The negotiation-system among Member States within the Council constitutes the core component of the normal decision-making procedures laid down in Articles 189a, 189b and 189c EC. However, non-state actors, in particular the Commission and the European Parliament, may have an important impact on outcomes of this system. Therefore, the impact of European committees may be directed at two *different points of reference*. They may influence the intergovernmental core of European decision-making and modify the outcome of Council negotiations among the Member States. They may also affect the institutional balance that exists between the Council (the Member States collectively), Commission and Parliament. A committee that does not have an impact on either of these points of reference will be largely irrelevant for the EC system and therefore falls outside the scope of this article.

The impact of committees on decisions is closely related to the functional differentiation of decision-making processes. It is difficult to believe that interaction in a committee will differ significantly, if it entirely replaces the normal decision-making process within the Council and deals with an identical set of issues. Thus, *meaningful committees* exist as satellite bodies in addition to some parallel entities that are frequently positioned higher up in the overall institutional structure.¹² A decision-making process may be sequenced so that a committee intervenes either before or after these other entities act. The mandate of a committee may also be restricted to specific aspects of the general decision-making process so that the committee deals with a particular subset of relevant issues. Finally, the attendance of a committee may systematically differ from that

¹¹ Council Directive 80/778/EEC on the quality of water for human consumption, (1980) OJ L 229/11.

¹² On the functional differentiation of decision-making processes, see Bora (1993).

of the normal decision-making process in order to fulfil its limited function. Thus, the more a committee differs in one or more of these three dimensions (sequence, mandate or attendance) from a (hypothetical) unitary decision-making process, the more the operation of a committee will deviate from the latter.

In order to establish how a committee may alter the interaction among the key European institutions, it is necessary to investigate how these actors *may* interact. Assuming that corporate actors do not easily sacrifice advantages without reciprocal benefits, they may be expected usually to pursue their parochial interests within a Community legislative project. Accordingly, negotiations may be conceived of as “bargaining”: the arm-twisting type of interaction among rational utility maximisers to accommodate and balance established interests. Bargaining should be distinguished from unilateral action or competitive behaviour that rules out consensus. Actors bargain not only to collectively establish mutually beneficial co-operation but also to achieve an individually favourable distribution of these gains.¹³ The eventual outcome will largely rely on the distribution of bargaining power among the actors that depends, in turn, not least on the number of votes assigned to the Member States and the formal competences granted to the supranational actors. Allowing European committees to participate in decision-making procedures may influence the allocation of bargaining power within the European polity. It may also affect the boundaries of the decision-making situation and modify the preferences of actors¹⁴ even though there is no change in the *mode of interaction* among the participating actors.

However, actors do not always bargain. If uncertainty prevails because of a lack of information or an inability to process the data, even rational utility maximisers may be motivated to question their preferences on the basis of convincing arguments or credible information. In complex situations, actors may also “argue”: they attempt to convince their counterparts of the appropriateness of their own points of view. This type of interaction does not preclude actors from pursuing their own interests, but their influence on a collective outcome will be based on the provision of convincing arguments and not on power. In order to collectively remove uncertainty and settle initially disputed issues in a Habermasian type of discourse, actors must have recourse to undisputed criteria.¹⁵ European committees

¹³ Hence, bargaining creates a tension between a collective and an individual interest that may cause the break-down of negotiations despite existing opportunities for mutually beneficial co-operation. See Scharpf (1992); Gehring (1996).

¹⁴ Adding and subtracting issues is a well-known instrument to influence the probability of successful co-operation. See Sebenius (1983).

¹⁵ In a Habermasian type of discourse, actors settle disputes essentially by individually invoking and collectively applying undisputed criteria located at a higher level of abstraction. See Habermas (1973). On the distinction between the interaction modes of “arguing” and “bargaining”, see Gehring (1996).

may provide the forum for this type of interaction based on the exchange of arguments. This function does not rely on formal decision powers. To be meaningful, it merely requires that conclusions are successfully introduced into the formal decision-making process.

The two ideally constructed interaction modes of "bargaining" and "arguing" fulfil very different functions within a comprehensive decision-making process.¹⁶ The former provides a mechanism for the accommodation of established interests in comparatively clear-cut situations, while the latter supports the collective removal of uncertainty and affects the definition of interests. Unfortunately, they require very different behaviour. Arguing presupposes the willingness of the participating actors to question their own views and, if necessary, modify their preferences. In contrast, successful bargaining relies on fixed preferences. Where the modes of interaction are deployed simultaneously, interference will occur.

European committees matter primarily because they influence the organisation of decision-making processes. Furthermore, they may also affect the mode of interaction among the participating actors, if the sequenced approach characterising committee-supported decision-making contributes to separating interaction in the arguing-mode from interaction in the bargaining-mode and promotes deliberative consensus-building, rather than the power-based pursuit of parochial interests.¹⁷ Yet, the mere existence of a committee does not ensure that arguing dominates over bargaining.

3. The Influence of an Advisory Expert Committee; the Case of the Expert Group on Drinking Water

Committees may operate as advisory bodies within a broader decision-making process. In this function, a committee does not need any formal decision-making competences. However, its advice will only be meaningful if it is integrated into the formal decision-making process. The specific way of embedding an advisory committee in an overall process is exemplified in the role of the *ad hoc* Advisory Group of National Drinking Water Experts in the preparation of the Drinking Water Directive.¹⁸

¹⁶ See Gehring (1995: 205-210).

¹⁷ A frequently observed (Neyer 1997: 29-30; Bach 1992) but rarely corroborated third candidate for committee influence is the "socialisation" of committee members over time. For a normative account which approaches "arguing", such as that adopted by the Bremen research group (Joerges/Neyer 1997a and 1997b), systematic European socialisation might cause a serious problem because committee members would no longer fully represent their home countries and committee opinions would lose legitimacy for their home constituencies. However, the effect may be largely overestimated because committee members still spend the bulk of their working time in their home offices and will be socialised predominantly within this framework.

¹⁸ Council Directive 80/778/EEC, above, note 11. On the Directive, see Haigh (1992: Chapter 4.4.).

In preparing the proposal for a Drinking Water Directive, the Commission determined the design of the Directive and elaborated the content of its main body, that would primarily outline the scope of the Directive, as well as central obligations and ancillary duties of the Member States. However, it refrained from selecting the detailed content of a number of annexes intended to define the specific standards for drinking water, in terms of parameters and their limit values, as well as the measurement techniques and analytical methods for the testing of these parameters. Since this task required expert information which it did not possess, the Commission set up the *ad hoc* Advisory Group of National Drinking Water Experts.

The experts attended in a private capacity but they were nominated by the Member States and originated predominantly from specialised state agencies like the German Federal Health Agency (*Bundesgesundheitsamt*). The *ad hoc* Group was given the limited task of advising the Commission on the parameters and figures to be inserted into the annexes. During 1974, the Group met several times and discussed the details of the annexes on the basis of a report written by a French *rapporteur*. The experts reached general agreement on the requirements for healthy drinking water, while some issues remained unsettled.¹⁹ The Commission mainly adopted the experts' conclusions for its proposal of the Directive.²⁰ It can be seen that, in this case, the expert opinion was assimilated into the formal decision-making process.

The Group had been delegated a limited task embedded within a larger legislative project. It was set up to advise the Commission on the appropriate quality standards for drinking water from a public health point of view, and it was not required to consider a broader range of issues that might also have been relevant for the creation of rules on European drinking water standards. Because of the restricted scope, the experts could rely on established professional criteria concerning such issues as toxicity testing, the credibility of epidemiological studies and consumption usages. In fact, they referred to standards that had been negotiated elsewhere and relied on, in particular, a recommendation of the World Health Organisation (WHO).²¹ *Procedurally*, the experts were invited to deliberate and, as far as possible, reach agreement, but they were not mandated to decide anything.

In this type of arrangement, consensus settles issues and increases the relevance of the advisory body at large.²² When disagreement emerges, the

¹⁹ For example, the relevance of regulating the total hardness of drinking water remained disputed, see Vch/Edom (1981: 474-475).

²⁰ COM(75) 394 final.

²¹ Ibid.

²² See Buitendijk/van Schendelen (1995: 50). Falke/Winter (1996: 567-575) compare the consequences of a successful and a failed attempt to achieve consensus in similar working groups.

Group will be unable to provide clear-cut advice and force the Commission to fill the gap on its own. The Commission had no reason to deviate from the opinion of the national drinking water experts, as far as their consensus reached, but it retained the power to determine the parameters in the event that the experts could not reach agreement. Under these operating conditions, it was not a viable strategy for a stake-holding Member State to send a representative merely to block consensus. This approach could not preclude the emergence of near consensus that might strongly influence the Commission's choice despite some remaining disagreement. In order to promote their interests, Member States would have to influence the deliberation process positively. Therefore, they were better off sending experts capable of *convincing* their colleagues of their opinion. In short, the arrangement was designed to encourage the Member States to send "real" water experts rather than negotiators thereby "forcing" them to argue and to pursue their interests by providing reasonable and convincing arguments on the basis of professionally shared criteria.

If the scientifically sound basis for the parameters and the limit values had been the only relevant criteria for the acceptability of the proposal by the Member States, then there would have been hardly anything left to negotiate within the Council. However, the Expert Group had not discussed a wide range of issues which were important to the overall acceptability of the directive; for example, its influence on the supply of drinking water in the Member States, its impact on domestic legal systems, or the expected improvement costs of upgrading the quality of national drinking water to the proposed minimum standards. On these issues, Member States' interests and national assessments as to the economic, financial and administrative implications of the EC standards varied considerably. Since the costs of achieving the standards were not uniform across the Member States, negotiations in the Council were fractious despite the almost unanimous scientific opinion. For example, the Directive related to more than 60 parameters whereas German law only checked 16 parameters; consequently, Germany felt that the costs following from the regular measurement and analysis of the parameters were too high.²³ Britain campaigned hard for a less stringent limit value on the content of lead in water because much of Britain's water supply is still delivered through lead-pipes.²⁴ The Netherlands politicised those parameters in the Directive which related directly to the saline content of water because this formed a part of its long-term struggle to desalinate the waters of the River Rhine.²⁵ It can be seen that the Expert Group did not pre-empt the negotiations in the Council.

²³ For the German position see Stellungnahme des Bundesrates, Drucksache 494/75.

²⁴ See Haigh (1992: Chapter 4.4).

²⁵ See Kromarek (1986: 31-32); Vch/Edom (1981: 474).

Because the Directive was based on Articles 100 and 235 EC, before the Directive could be adopted by the Council, unanimity of the Member States had to be achieved. The intense negotiations in the Council took five years of "bargaining": the balancing of established interests. Primarily, the Council considered the main body of the Directive. General concerns of the Member States as to the perceived "rigidity" of the Directive resulted in the incorporation of a number of measures designed to relax the strict legal regime.²⁶ The Member States agreed to extend the transition period for implementation from two to five years. Furthermore, no less than three new exemption clauses were introduced: under certain conditions, there was a further extension of the transition period; there was also a provision on the temporary infringement of limit values for drinking water abstracted from exceptionally bad surface waters; and, as a safeguard clause, the temporary lifting of the limit values in emergency situations. Besides altering the temporal implementation of the Directive, in some cases, the Council also modified the legal status of parameters; for example, it classified the chloride and conductivity parameters as non-mandatory "guide-values" rather than as binding maximum concentrations. On the issue of lead-pipes, it added a "commentary", in particularly unclear language, on the lead value with the result that the Directive allowed the lead value to be exceeded where there is lead-piping, notwithstanding the fact that the Directive retains the original, scientifically based figure.

In short, the Council significantly amended the Commission proposal and introduced a number of lacunae in order to produce a text that was acceptable to every Member State. It is remarkable, however, that the Council resorted to manipulating the impact of the entire Directive on the domestic water supply systems and largely *refrained from adjusting the figures and parameters elaborated by the advisory Expert Group*. In fact, it was more difficult to bargain over the part of the Directive that had been subject to far-reaching expert consensus than over those parts which had not been previously subject to expert advice. This strategy of the Member States suffered a set back before the European Court of Justice several years later. The Court considered a case concerning the definition of the "emergency situation" in the safeguard clause contained in the Directive.²⁷ The Court adopted a narrow interpretation of the provision with the result that the most important loophole was effectively closed. Whereas the Council had introduced this provision to relax the strict provisions of the Directive and to facilitate compromise, the Court's interpretation meant that the Member States were more firmly bound to the strict limit values of the Directive. Accordingly, within the institutional framework, the conclusions of the advisory expert committee did not only affect the negotiation process and the design of the Directive. Over time, they also had a serious

²⁶ See preamble to the Directive, above, note 11.

²⁷ See Case 228/87, *Pretura unificata di Torino* [1988] ECR 5099.

impact on the substantive content of the obligations contained in the Directive as the Court closed lacunae on the Directive's scope.

The long and fierce struggle over the Directive within the Council suggests that the Member States defended important stakes and did *not* refrain from bargaining. The impact of the committee on the outcome cannot simply be explained as an apparently low importance project, nor by a general "problem-solving" attitude of the negotiators; rather, it may be attributed to the particular position of the expert committee within the overall decision-making process. The conscious separation of committee deliberations from Council negotiations had the effect of protecting the professional discourse of water experts as far as possible from bargaining. In the area of drinking water, arguing dominated and facilitated the emergence of a professional consensus. States had to send "real" experts – rather than negotiators pursuing general state interests – to influence the deliberation process. A prerequisite for the dominantly discursive interaction of experts was, however, the embeddedness of their deliberations in a broader decision-making process. States *could afford* to send water experts precisely because they knew that they retained the opportunity to struggle for their aggregate interests in the subsequent negotiations in the Council. If the whole Directive had been negotiated in an expert committee, the Member States would have been encouraged to send "tougher" negotiators. Similarly, if the Directive had been prepared in the Council, national delegations desiring to mitigate implementation costs would have been motivated to question the scientific basis of strict limit values. In both cases, arguments actually intended to convince another party would have been mixed indistinguishably with moves in the bargaining process. The risk of misunderstanding would have increased and the negotiators would have been less inclined to question the preferences of their states as a prerequisite for a meaningful discourse. In these surroundings, the chances of achieving professional consensus would have been seriously reduced.

The degree of professional consensus actually produced by the advisory committee proved difficult to challenge in later stages of the decision-making process. Although negotiators bargained vociferously, they could not simply push aside a consensual and scientifically based conclusion agreed upon by their own experts. However, the professional consensus did not dominate the overall interests of the Member States because it did not cover the entire range of relevant "administrative" aspects. Thus, the experts' conclusions persisted while national representatives bargained over the impact of these conclusions on their domestic water supply systems.

More generally, advisory expert committees may facilitate, and rationalise in the Habermasian sense, decision-making, if their task is deliberately limited to the exploration of one set of relevant aspects according to agreed upon (professional) criteria. The contribution of committees to European governance relies on an institutional barrier that separates their

deliberations from the arena of actual decision-making and protects them from being contaminated by the inclusion of extraneous components which belong elsewhere in the overall decision-making process.

4. Decision-making in Comitology Committees

A very different sort of committee is designed to adapt directives to "scientific and technical progress". Committees of this type are envisaged under virtually all of the environmental directives. In 1975, the Environment Council had agreed on a model article²⁸ according to which these committees would generally operate under what later came to be known as the "regulatory committee (*filet*) procedure" or "the IIIa committee procedure".²⁹

Establishing a committee of this type generally modifies the applicable decision-making procedure. This modification may be assumed to be acceptable to the Member States only where benefits of for example, avoidance of stalemate or unforeseen problems, outweigh the costs, such as the loss of bargaining power and an increased risk of undesirable decisions. Generally, this balance will be particularly favourable if at least one of the following three conditions is fulfilled:

- a) a common goal renders even an individually costly committee decision generally acceptable, or,
- b) the new procedure does not introduce major changes compared to the original decision-making procedure, or
- c) the procedure is limited to the adoption of decisions of minor importance.

With respect to the common goal (a), the establishment of a committee touches the distinction between product and process regulation. The Member States will have less difficulty in assigning case-by-case decisions to a European committee, where speedy European decision-making promises to increase benefits from other issue-areas that may be traded off against the risk of undesirable committee decisions. The area of product regulation generally allows this trade-off because it contributes to removing national obstacles to transboundary trade.³⁰ In contrast, the

²⁸ See Council Resolution on the adaptation to technical progress of directives or other Community rules on the protection and improvement of the environment, (1975) OJ C 168/5.

²⁹ In accordance with the "Comitology Decision" of the Council, (1987) OJ L 197/33; see Meng (1988); Ehlermann (1988). For a description of the procedures, see Vos in this volume.

³⁰ On the difference between product regulation and process regulation, see Weinstock (1984); Rehlinger/Stewart (1985); Scharpf (1996b); Gehring (1997). On foodstuffs and the committee-like agency arrangement for pharmaceuticals, see Hankin (1997); Gardener (1996); Joerges/Neyer (1997a).

costs of European process regulation are usually not matched by overall gains in other sectors; consequently, Member States tend, in general, to be more reluctant to assign significant powers to comitology committees in this area. Accordingly, establishing comitology committees in environmental process regulation may be assumed to rest predominantly on the remaining options (b and c). Committees could be expected to be created in areas in which the related modification of decision-making procedures is modest. Furthermore, for less important issues, such as those of a technical nature, it could be expected that decision-making would be left to comitology decision-making. However, it is likely that issues which are more important are dealt with by the unbridled political process. In this Section, the powers and decision-making activities of comitology committees in three areas of environmental process regulation will be examined according to these criteria.

4.1 *The Drinking Water Committee*

The Commission proposal for the Drinking Water Directive included the establishment of a regulatory committee (IIIa) that would be generally responsible for the adaptation of the annexes to scientific and technical progress.³¹ These technical and predominantly science-based parts of the Directive had been elaborated largely by the *ad hoc* Group of National Drinking Water Experts.³² Any amendment to the annexes would be based on scientific expertise and the specific knowledge of public health experts. However, the Commission proposal was heavily contested within the Council.³³ Eventually, the final version of the Directive adopted by the Council reduced the power of the Drinking Water Committee to the adaptation of only one of the annexes that dealt with measurement techniques and analytical methods. Every other detail encapsulated in the annexes, such as the parameters, the limit values and their legal status (mandatory or advisory values) had to be revised according to the normal decision-making procedure. In effect, the scope of the Drinking Water Committee was not really significant, and in practice the Committee never met.

The Directive suffered from a serious implementation problem.³⁴ Part of the difficulty was the fact that numerous parameters of minor importance had to be measured regularly and analysed according to specific procedures. Consequently, it became clear that implementation would benefit from separating substantive and formal cases of non-compliance. Therefore, an *ad hoc* group of high-level governmental experts of the Member States agreed that the annexes of the Drinking Water Directive and some other quality standard directives required adaptation and that

³¹ Above, note 20.

³² Above, Section 3.

³³ See Kromarek (1986: 33-36).

³⁴ See Krämer (1992).

committee-based decision-making was the appropriate way forward. However, it was felt that the committee decisions ought not change the ambition of the directives and should not have economic implications for the Member States.³⁵ The decisions ought to be limited to "minor" issues. Against this background, the Commission proposed in 1988 to establish a uniform committee procedure which would cover four directives, including the Drinking Water Directive.³⁶ It was proposed that the committee would participate in the modification of all the annexes of these directives with the result that it would be responsible for changing, adding and removing parameters, limit values and measurement methods. The Commission intended that the committee set up under the directives concerned would operate according to the regulatory committee procedure (IIIa), which is most widely used in environmental legislation.³⁷ Despite the earlier agreement, a number of Member States blocked the proposal, fearing that the committee might adopt costly decisions.³⁸ Thus, the attempt to establish a committee competent to modify the relevant annexes failed once again in the Council and the project was eventually abandoned in 1990.³⁹

In order to understand this failure to establish a meaningful comitology committee in an area in which an advisory expert committee had been quite successful, it is necessary to consider the role of the committee proposed by the Commission within the larger decision-making process. The function of the proposed committee differed greatly from that of the advisory expert committee. Although any amendment of an annex of the Directive by a committee decision did not preclude other professional advice of drinking water experts being sought, the expert deliberations had to be organised either in the form of a new *ad hoc* committee operating under the auspices of the Commission (beyond the remit of the Drinking Water Committee's control), or in the form of a working group of the committee, thus differentiating its own institutional structure. In both cases, the comitology committee would have been the recipient and not the producer of this advice. Accordingly, the joint committee for the quality standard directives was not designed to benefit the Council negotiations, it was intended to replace them. A Member State intending to pursue its

³⁵ See the Introductory Note in COM(88) 752 final, 7.

³⁶ Commission proposal for a Council Directive amending directives 80/778/EEC on drinking water, 76/160/EEC on bathing water, 75/440/EEC on surface water and 79/869/EEC on methods of measurement and frequencies of analysis of surface water, COM(89) 478 final.

³⁷ Initially, the Commission had proposed to grant the Member States a right of initiative but amended its proposal after an intervention of the European Parliament, see its amended proposal (1989) OJ C 300/13.

³⁸ See Europe Environment, 27 March 1990.

³⁹ In 1995, the Commission adopted a different approach and submitted a fresh proposal for a revision of the Drinking Water Directive, (1995) OJ C 131/5, see also its amended proposal, (1997) OJ C 213/8.

overall "national interest", however determined, would have to do so within this committee, because there might not be a second stage of decision-making.

Even though the proposed comitology committee could not operate on the terms of the advisory expert committee, it was also designed to perform a particular function within the larger decision-making process. The committee would have constituted the follow-up stage preceded by political decision-making on the directive according to the normal procedure. It would operate within the margin and according to the criteria contained in the Directive. The political pre-decisions envisaged the switch from unanimity to qualified majority voting which would have had considerable implications for the distribution of bargaining power. The committee would seriously soften the voting requirements for follow-up decisions. Before the introduction of qualified majority voting for environmental matters inserted by the Treaty of Maastricht, the Member States preserved their individual veto power according to the unanimity requirement in Articles 100, 235 and 130s EC, while even the most restrictive comitology committee procedure would deprive them of this power resource.⁴⁰

The proposal to establish a committee with the power to amend all annexes might have been feasible if its activities could have been restricted to issues of minor importance. Unfortunately, the pre-decisions did not clearly distinguish between minor and major decisions. This endeavour was doomed to fail not least because the main body of the Drinking Water Directive does not contain all the important provisions, and the relevance of the annexes is not limited to mere technicalities. Thus, the committee's activity would have been directed only loosely by preceding decisions and the committee would have enjoyed a wide margin of discretion. Formally at least, the committee was rather powerful and, over time, it might well have introduced important changes to the European policy on drinking water. The agreement of the Member States not to change the "ambition" of the Directive by committee decisions and not to adopt costly decisions reflects another attempt to demarcate the line separating minor from major decisions. However, this guideline was not formally binding and could not, therefore, ensure that it was actually followed in the long run.

In short, by agreement on the proposal, the Member States would have had to accept a major procedural change and they would not have been sheltered from undesirable decisions of the utmost national importance.

⁴⁰ One might even argue that the primary intention of establishing comitology committees in environmental process regulation was to avoid the "joint decision trap" (Scharpf 1985) that occurred as a consequence of the transfer of a competence to the European level and the still low problem-solving capacity at that level. The fact that any change of a unanimously agreed directive required once again a unanimous decision threatened to create the "problem of obsolescence" (Rehbinder/Stewart 1985: 279) in as dynamic an area as environmental policy-making.

Therefore, it is not particularly surprising that some of the Member States blocked the envisaged expansion of committee decision-making.

4.2 The Nitrate Committee

The Nitrate Committee is an example of a "powerful" committee in environmental process regulation that was established successfully and has been operating for several years. Late in 1991, the Council adopted unanimously the Nitrate Directive⁴¹ based on Article 130s EEC. The Directive was the first piece of environmental legislation regulating the adverse effects of modern farming practices on the environment. The main body of the Directive obliges the Member States to monitor their water resources for pollution by nitrates, identify areas draining into waters that are vulnerable to nitrate pollution and eutrophication, and elaborate and apply action plans. A number of annexes contain specific criteria for identifying vulnerable areas, the content of action plans, and a code of good agricultural practices. Annex III contains the most far-reaching specific obligation: annual limits on the amount of manure that can be spread. The permitted amounts of manure are gradually lowered: in the first four year period, the amount is 210 kg/ha N; thereafter, the rate is dropped to 170 kg/ha N. In terms of its legal architecture, the Nitrate Directive closely resembles the Drinking Water Directive because core obligations are codified in its annexes.

Somewhat surprisingly, the regulatory Committee established under the Nitrate Directive has far-reaching decision-making competences. It is empowered to adapt, without any further express constraints or guidelines, all annexes to scientific and technical progress. Hypothetically, it could seriously tighten, or weaken, the limit values for manure. It is also not prevented from introducing new policies such as a detailed limitation of the application of industrial fertilisers. The Nitrate Committee, therefore, is very powerful in terms of its formal powers. The extent of powers might suggest that the Member States had been willing to relax their direct control over the future of regulatory processes in the area of nitrates, but this approach appears to be in direct contrast to the approach pursued by the States in the areas of drinking water and the packaging of waste.

This apparent contradiction can be explained by viewing the decision to create the Nitrate Committee against the backdrop of the general decision-making process of an EC policy in the area of nitrate pollution. The negotiations of the Nitrate Directive coincided with the Conference on Political Union⁴² that was in the process of drafting the Treaty of

⁴¹ Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources, (1991) OJ L 375/1. On the Directive, see Conrad (1992: 188-192).

⁴² On this conference, see Corbett (1992).

Maastricht. During the course of the Conference negotiations, it became clear that for environmental issues based on Article 130s, the co-operation procedure would be used and that the unanimity requirement for Council decisions would be softened to qualified majority voting. Notwithstanding the fact that the Nitrate Directive itself was still adopted under the old unanimity requirement, it was already clear to the Member States that any subsequent amendments of the Directive would fall under the new procedure contained in Article 130s EC with the result that Member States would no longer be able to use their former power of veto. As the new Treaty had revised the overall decision-making process, the Member States in the Council faced a choice: either the Council could send the amendments through the co-operation procedure, thereby reinforcing the role of the European Parliament; or it could establish a comitology committee with the effect of empowering the Commission. Faced with this decision, the Member States chose to retain control over the development of the Community nitrate policy in collaboration with an empowered Commission by establishing a comitology committee and virtually excluded the Parliament from the decision-making process. However, the Council limited the power of the Commission as far as possible by agreeing to the *contre-filet* variant of the regulatory committee procedure (the "IIIb committee procedure")⁴³ which gives the greatest possible bargaining power to the Member States. The agreement on the Nitrate Committee and the scope of its powers can be explained therefore as a consequence of the Member States' desire to preserve rather than to change, the established decision-making procedure as far as possible.

Although the Nitrate Committee meets regularly, it has not yet adopted any formal decision.⁴⁴ The introduction of new policies or the tightening of existing ones is currently not viable because the Member States already face serious difficulties to implement the existing policy. Meanwhile, the Commission has commenced Treaty infringement proceedings against almost every Member State. Against this background, the Netherlands asked in 1996, on the basis of an exemption clause, for an approval to calculate the limit values for manure in a way that would have the effect of allowing values much higher than those normally permitted. This attempt to dilute the limit values might have jeopardised the European nitrate policy if it had been followed by other Member States. Therefore, the Commission submitted the formal proposal for a decision rejecting the Dutch application to the Committee. Voting was postponed because the Committee members were reluctant to outvote a Member State. However, the Netherlands withdrew its application because it had become clear that

⁴³ The Commission, however, had proposed a IIIa committee procedure, see (1989) OJ C 54/4.

⁴⁴ Information on the actual activities of the Nitrate and Packaging Waste Committees is based on interviews conducted in Bonn and Brussels.

it would not be able to gather a qualified majority in favour of its plan. Hence, it was the lack of support from the other Member States that prevented a serious backtrack from an established policy. The Dutch action emphasises that a Member State may have important interests in a particular committee "decision" and that it may well be determined to use its power resources to influence the outcome even though, in this case, the Dutch move was unsuccessful.

The Nitrate Committee demonstrates the general problem related to decision-making in powerful committees. The power of a committee is rooted in its ability to take important decisions independently and is, therefore, immediately related to a large degree of discretion. Under these conditions, the formal activities of a committee are not strictly governed by criteria established at a higher political level (i.e. the Council). Yet, the less clearly committee decision-making is guided by pre-decisions, the more closely will it resemble normal Council negotiations. Hence, comitology committees that are powerful in the present understanding reflect a low degree of functional differentiation of overall decision-making processes. Somewhat paradoxically, the more powerful a committee is in terms of its formal "decision-making powers", the less far-reaching consequences will the transfer of a decision from the Council to the committee entail.

4.3 The Packaging Waste Committee

The Packaging Waste Committee provides the example of a formally "weak", albeit operating, comitology committee. The Committee was created under the European Parliament and Council Directive 94/62/EC on packaging and packaging waste.⁴⁵ This Directive establishes mandatory targets for the recovery and recycling of packaging waste and contains quality requirements for packaging; for example, limit values on the content of certain heavy metals, as well as the general obligation to accept packaging that meets these requirements onto domestic markets.⁴⁶ Since the Packaging Waste Directive was adopted under the co-decision procedure, in accordance with the qualified majority rule in Article 100a EC, committee decision-making changed the applicable procedure in a way different to that of the proposed Drinking Water Committee because this Committee was to be adopted under the unanimity rule.

The differences between these two committees were not limited to voting requirements because the Packaging Waste Committee formed part of an

⁴⁵ (1994) OJ L 365/10. On the directive, see Porter/Butt Philip (1993); Porter (1995); Golub (1996).

⁴⁶ This directive combines a process-related and a product-related component. It started as a purely process-related project and moved, during the preparatory process, tacitly toward product regulation. See Gehring (1997).

ambitious attempt to develop a long-term European policy on packaging waste. As the policy requires future revisions according to the normal co-decision procedure, the primary task of the Committee is not the general adaptation of the Directive to scientific and technical progress; it is responsible only for the adaptation to scientific and technical progress of two aspects of comparatively minor importance: a marking system and the building of a data bank. Consequently, the political pre-decisions in the area of packaging waste placed most of the important issues beyond the remit of the Committee and strictly limited its potential autonomy in this area of decision-making.

Instead, the Committee was set up primarily to *relieve* the Council. It may adopt specific measures in a number of areas to solve difficulties arising from the implementation of the Directive. The Committee has been active in these areas and so far it has participated in the adoption of two formal decisions on the marking system and the structure of the envisaged data bank. These decisions had been prepared by extensive discussions and were adopted by written communication. The written communication procedure significantly differs from the normal committee procedure: the Commission communicates the draft decisions to the Committee members but then takes any failure to reply as a positive note. Accordingly, negative rather than positive votes are to be voiced.⁴⁷

Currently, the Committee is in the process of drafting decisions on the exemption of certain glass and plastics packaging from the restrictions in the Directive relating to the content of heavy metals. To prepare these decisions, the Commission has initiated three rounds of open discussion on the subject and collected the points of view of the Member States. Subsequently, it has summarised the debate and submitted its conclusions that were in turn hotly debated in the committee. In a future session of the Committee the Commission is expected to submit informally draft decisions that will gather sufficient support for adoption. Only then will this draft be introduced into the formal committee procedure, pass the relevant Commission units, be translated into the official languages, and thereafter be decided upon by the Committee.⁴⁸

The function of relieving the Council underlines the impact of introducing a separate stage of secondary decision-making into the overall decision-making process. All of the Committee's decisions concerned could have been dealt with by the relevant Council working group, as had

⁴⁷ However, no Member State voted in the negative.

⁴⁸ Thus, Falke's observation that proposals for decisions submitted by the Commission are rarely rejected (Falke 1996: 138-143) primarily reflects the fact that these decisions are well prepared in light of the constellation of Member States' interests. It does *not* imply that the Member States refrain from employing their bargaining power to promote their interests. See van Schendelen (1996: 32-33).

been initially proposed by the Commission. Instead, the decisions are taken by a very similar group of Member State representatives but within the distinct institutional framework of the Committee. Due to this modification, decisions are no longer part of a comprehensive package involving numerous other issues. For example, when the particularities of the marking system are discussed, the desirability of a European policy on packaging waste and the general approach of the Directive are no longer subject of contention. In this subject-area, the political pre-decisions define a narrow scope for autonomous committee decision-making. Accordingly, introducing a second (committee) stage of decision-making following the preceding "political" (Council and Parliament) stage significantly modifies the surroundings of decision-making in which the stake-holding actors operate.

The surroundings influence those decisions taken within the distinct second stage of a larger process. The more precisely the political pre-decisions structure and direct committee decision-making, the less "powerful" a committee is in terms of its ability to adopt decisions independently. In this sense, the Packaging Waste Committee is a "weak" committee. Nevertheless, "weakness" alone does not promote arguing over bargaining. A Member State that is seriously affected by a decision will mobilise its bargaining power in any type of comitology committee to influence the outcome in its own favour. Admittedly, interaction in weak committees may be less prone to fierce bargaining simply because the decisions are too unimportant due to the small margins of committee autonomy.

However, the more closely guided a comitology committee is by clear-cut and general criteria adopted elsewhere, the more important will be *the transfer* of a decision to a committee. If the Member States agree at the political stage on reasonable general criteria, for example because they are not aware to which cases these criteria will be applied over time and how their parochial interests will be eventually affected, and if committee decision-making is closely governed by these criteria when dealing with specific cases, the division of decision-making between two functionally interdependent stages may well encourage actors to refrain from bargaining *at both stages*. In this case, a committee will be weak in terms of a limited margin of discretion but it will be important because it discharges an indispensable task for an altogether important decision-making process. Therefore, weak committees are not necessarily irrelevant; they may well reflect a more successful functional differentiation of decision-making between the Council (and Parliament) stage and the committee stage.

5. Informal Functions of Comitology Committees

If comitology committees convene regularly, they may fulfil additional functions not formally envisaged in the directives. The Nitrate Committee and the Packaging Waste Committee have evolved into regularly-meeting consultation fora, whereas the policy on drinking water has lacked a comparable forum because of the inactivity of the Drinking Water Committee. The systematic and repeated convening of meetings can be advantageous for Community policy-making. For the Commission, committee meetings constitute a source of information on the difficulties occurring in the implementation process and on the opinion of the Member States on the subject. For the Member States committees provide an opportunity to explain their approaches and voice their concern about the behaviour of other Member States. Within the framework of the Packaging Waste Committee, for example, France questioned the German “*Duales System*” (the “green dot” system) because of its discriminatory effects on foreign producers. The United Kingdom made clear that it interpreted the Directive in such way as to render the Danish ban on beverage cans illegal.⁴⁹ Disputes on the appropriate implementation of a directive are thus introduced into the multilateral setting of the Committee and withdrawn from the bilateral relationship between a single Member State and the Commission.

One important source of conflict is the correct interpretation of disputed or unclear clauses. The Nitrate Committee interpreted a number of concepts and clauses that are not clearly defined in the Nitrate Directive. For example, it agreed that the mandatory limit values for the application of manure per hectare had to be achieved only by the end of the four year action programme and were not binding for the whole period. Likewise, it agreed on the transformation of the nitrate target into animal units and settled the question as to whether the figures stipulated in the annex of the Directive applied to the average of a farm or to every part of its lands. Currently, it is discussing the nature and extent of monitoring obligations and the criteria establishing agricultural effects on surface waters. Likewise, the Packaging Waste Committee is endeavouring to elaborate a clear-cut definition of “packaging” that is crucial for the proper assessment of recovery and recycling quota.

Over time, a standard procedure has evolved for the interpretation of disputed clauses in environmental directives. A dispute is first discussed in the committee (stage one). Next, the responsible Commission division summarises the exchange of arguments and states its own interpretation of

⁴⁹ The British position was established as early as 1987 in the famous *Danish Bottles* case, Case 302/86, *Commission v. Denmark* [1988] ECR 4607.

the disputed clause in a working paper to be examined by the legal service of the Commission to check its compliance with European law (stage two). Subsequently, the paper is discussed within the committee (stage three), and, where necessary, this process may be repeated.

This standard procedure contributes remarkably to producing discursively reasonable results. In the first round, the Member States discuss a disputed interpretation with each other. A stake-holding Member State may generate consensus on its preferred view, but to affect the outcome, it must (also) convince the Commission. Hence, it may well pursue its own interests but it is encouraged to provide reasonable arguments rather than rely on its power resources with the effect that the Member State must argue rather than bargain. In addition, the Member States are hindered from agreeing on a "convenient" solution among themselves because the Commission dominates in the second stage. Nevertheless, it would be imprudent of the Commission to adopt any "convenient" interpretation because it will subsequently have to convince the Member States of its choice. Therefore, it is well advised to consider the arguments put forward in the preceding discussion and base its judgement on criteria that are accepted by the Member States. These criteria are basically provided by the directive as well as the *acquis communautaire*, in short by European law that is equally mandatory for all actors involved and enables all actors to challenge any interpretation before the European Court of Justice.

If the Commission reaches and submits to the committee an interpretation that is not convincing according to these criteria, interested Member States may challenge it in the third stage in a – now predominantly legal – discourse on the basis of the same criteria. However, if an interpretation is reasonable and convincing, there will be no point in a stake-holding Member State rejecting it because it contradicts national interests. The interpretation merely indicates an appropriate application of the directive compatible with European law and does not itself oblige the actors to anything. In particular, it does not prevent a Member State from implementing the relevant directive according to its own interpretation, but this decision raises the risk that "deviant" behaviour may result in Treaty infringement proceedings. Likewise, the Commission is not prevented from commencing such proceedings notwithstanding a Member State's compliance with a commonly agreed interpretation, but it risks being unsuccessful before the Court. Hence, a common interpretation is not meaningless; it may affect behaviour because the powerful actors are well advised to *consider* it when deciding upon their unilateral moves.

The standard procedure for the committee-supported interpretation of directives promises to produce altogether "rational" results in the Habermasian sense. It does so by forcing both the Member States and the Commission into an exchange of arguments that makes the pursuit of interests only promising as far as it is based on the provision of reasonable

arguments.⁵⁰ The influence of comitology committees in this informal function relies on their ability to generate consensus and collectively remove uncertainty. Like advisory committees, they are influential precisely because they do not take the final decisions.

For the process of European governance, the informal activities of a comitology committee may be at least as important as the formal ones.⁵¹ Unfortunately, the formal and informal functions of a comitology committee will frequently operate according to different modes of interaction.⁵² Formal decision-making cannot fully avoid bargaining because the Member States will not, and should not, ignore their national interests. Informal functions require arguing because they rely on the emergence of consensus that actually convinces the participating actors; thus, comitology committees are hybrids that must accommodate two different, and possibly conflicting, modes of interaction.

6. Conclusion

The existence of committees indicates that decision-making processes are functionally differentiated. In addition to changes of formal decision-making procedures, European committees may affect outcomes of decision-making processes in two conceptionally distinct ways. They may define a particular subset of issues relevant to a larger decision-making process and simply re-shape the decision situation in which the participating actors interact. Under certain conditions they may also provide the foundation for a systematic transformation of the mode of interaction from bargaining to arguing. These two different types of committee influence should be analytically distinguished from each other, even though they may occur simultaneously in a single case.

In environmental process regulation, European comitology committees may be formally very powerful. This is true for the proposed Drinking

⁵⁰ Similar to the interpretation of unclear terms, informal committee interaction may lead to agreement on the deficits of a directive and guide the Commission proposal for a normal amendment to be adopted according to the applicable decision-making procedure. This function was less relevant in the present cases.

⁵¹ Indeed, the Commission repeatedly attempted to formalise the informal function. In its proposals on the Nitrate Directive, (1989) OJ C 54/4 and (1990) OJ C 51/12, and the Directive intended to establish a uniform committee procedure for some water directives, COM(88) 752 final, committees were assigned the task of advising the Commission on its request on all matters relating to the implementation of the directives. This expansion of formal committee activity was rejected by the Member States.

⁵² Principally, the informal functions could be discharged by additional advisory committees. However, it is much easier to motivate "governments" to participate in a comitology committee than require a group of governmentally designated experts to attend an *ad hoc* committee set up by the Commission.

Water Committee and for the Nitrate Committee. The former was rejected by the Member States because it would also have changed the applicable decision-making procedure significantly, while the latter was accepted precisely because it promised to preserve the established procedure as far as possible. These committees have, or were designed to have, very broad competences to modify and adjust important parts of the respective policies. Their far-reaching formal power is rooted in the absence of strict guide-lines established by pre-decisions taken at a hierarchically higher level. Therefore, committee decision-making involves wide margins of discretion, and decisions may touch important interests of Member States. Accordingly, powerful committees will not dramatically redefine the bargaining situation and formal decision-making may be expected to reflect largely intergovernmental bargaining in the Council. This type of committee is not particularly well suited to transform interaction related to formal decision-making from bargaining to arguing.

Other comitology committees, like the Packaging Waste Committee, are formally quite weak. Their activities are governed by comparatively clear-cut and carefully demarcated powers and decision-making criteria. The decisions of committees of this type will be more closely guided by the relevant political pre-decisions. Accordingly, they enjoy only a comparatively small margin of discretion. Decision-making within a weak committee will differ more profoundly from the original situation than that in a powerful committee. Since a weak committee has less freedom of choice, it will on average touch less important national interests. Yet, this conclusion does not prove the low relevance of these committees; on the contrary, they may well be simultaneously weak in the present understanding and important for the related overall decision-making processes, if the political (Council) stage is largely limited to establishing generally applicable and clear-cut decision criteria, and if committee activity is limited to applying these criteria to specific cases. Accordingly, a weak committee may reflect a more advanced functional differentiation of decision-making.

Finally, European committees may matter, even though they are formally entirely powerless. This is not only true for advisory committees like the *ad hoc* Committee of National Drinking Water Experts but also for comitology committees in areas in which they do not take formal decisions. This advisory type of committee activity is directed at *convincing* decision-makers of the relevance and reliability of the advice given. Interaction in the bargaining mode or the adoption of decisions by voting would merely reflect the distribution of bargaining power. To produce convincing arguments and reliable information, the participants are therefore compelled to interact in the arguing mode. The institutional separation of the advisory and the decision-making functions of an overall decision-making process provides the necessary protection of discursive

interaction from undesirable intervention of bargaining. The empirical investigation in this paper suggests that the activities of comitology committees in environmental process regulation are, to a large extent, related to this advisory and informal function.

Clearly, committees may well contribute to eroding the crude pursuit of national interests and thus promote "deliberative problem-solving" in European governance. Generally, this effect may be attributed to the functional differentiation of decision-making processes and the delineation of areas in which bargaining constitutes the less viable mode of interaction for the Member States to pursue their interests. Somewhat paradoxically, formally weak committees that enjoy little or no freedom of independent choice and which are quite strictly governed by general criteria may modify interaction among the participating actors more profoundly than committees with far-reaching formal powers. In this sense, the extent of a committee's formal powers is inversely related to its contribution to European governance.